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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 592

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY,

Petitioner,

vs.

ACME BRICK COMPANY,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on December 29, 1950.

Opinions Below

No written opinion was prepared by the District Court upon the entry of its Order to Dismiss (R. 18). The opinion of the Court of Appeals (R. 23) is unreported.

Jurisdiction

The judgment of the Court of Appeals was entered on December 29, 1950 (R. 25). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

Question Presented

Whether a shipper, when its own employees were out on a strike with picket lines established across all entrances to the shipper's plant, may bring a lawsuit for loss of its alleged profits during the period of the strike against a railroad, involving a practice adopted and applied uniformly by the railroad in regard to serving such strike bound shippers, without the shipper first securing a finding by the Interstate Commerce Commission that such practice upon the part of the railroad was unreasonable or discriminatory.

Statement

This is a suit for $167,246.87 in damages and penalties brought by Acme Brick Company against Chicago, Rock Island and Pacific Railroad Company for the failure and refusal of the Chicago, Rock Island and Pacific Railroad Company to furnish car service to complainant's brick plant at Bridgeport, Texas. Complainant alleged that prior to October 4, 1948, the defendant furnished car service to it and had at all times met its demand for such car service, but that on October 4, 1948, and continuously thereafter, although complainant requested such car service, the defendant wholly failed and refused to accede to complainant's request until April 22, 1949, all of which refusal and failure was in breach of its duty and obligation to the complainant and it thereby arbitrarily and unlawfully discriminated against complainant as a shipper (R. 9-13).

To this complaint the defendant railroad company filed its motion to dismiss, because complainant, prior to bringing said action, did not resort to and secure from the Interstate Commerce Commission a determination as to the reasonableness or lawfulness of the practice involved upon the part of the defendant railroad company (R. 14).

In this motion, supported by proper affidavit, the defendant railroad company said to the Court that on the date alleged by complainant, to-wit, October 4, 1948, the employees of the complainant went out of its plant on a strike and set up a picket line across the entrances to said plant. That the train crews operating defendant's switch engines were unable to cross said picket line and spot cars within complainant's plant because of the apparent and imminent danger existing at such picket line. That its switch engines would proceed three times each week to the entrance of complainant's plant, but due to being barred by said picket line, said train crew could not enter complainant's plant and deliver empties to complainant until April 22, 1949, when the picket line was removed.

The complainant did not file a responsive pleading to this speaking motion of the defendant to dismiss.

The District Judge sustained the motion to dismiss upon the ground that prior resort should have been made by complainant to the Interstate Commerce Commission to determine the reasonableness of the practice of the defendant (R. 18).

The facts are not disputed. It is apparent on the face of the pleadings that the labor dispute was between the complainant and its employees; that the strike was a strike of complainant's employees for which the defendant railroad company was not responsible; that as a result of the strike the complainant lost profits; and finally that by this suit the complainant is attempting to compel the defendant to pay to the complainant the losses which the complainant is supposed to have sustained as a result of the strike of its own employees.

The real issues in this case are the obligation of a carrier to furnish rail service to a strike bound plant regardless of the conditions and the results to the railroad, its em-

ployees, its other shippers, and the public, and of the obligation of a railroad to pay the strike losses of a shipper even though the railroad was not involved in or responsible for the strike, and just because of the railroad's decision or practice to not place armed guards or armed employees or officers upon said switch engine and thereby attempt to break the picket line being maintained by complainant's own striking employees.

Specifications of Errors to Be Urged

The United States Court of Appeals for the Fifth Circuit erred:

1. In holding that a shipper may bring a common law action for damages against a railroad involving a practice established by the carrier in regard to car service without the shipper first securing a finding by the Interstate Commerce Commission that such practice was unreasonable or discriminatory.

2. In holding that a carrier by rail was under the absolute duty to furnish car service to a shipper even when the shipper's own employees were out on a strike with picket lines established across all entrances to the shipper's plant. This, even though the carrier had adopted a course of conduct or practice to guide its actions under such circumstances and which practice or course of conduct had not been declared unreasonable or discriminatory by the Interstate Commerce Commission.

3. In holding that the courts are to decide the reasonableness and lawfulness of a practice or rule established by a railroad in regard to car service to strike bound shippers.

4. In reversing and remanding the judgment of the District Court which dismissed this action, because the complaining shipper had not made prior resort to the Interstate Commerce Commission to test the reasonableness

of the practice established by the railroad company and which practice was involved in this lawsuit.

Reasons for Granting the Writ

1. Clearly, the question presented here is of the utmost importance to carriers, shippers of freight, to the public at large, and to the administration of the Interstate Commerce Act by the Interstate Commerce Commission. The settlement of this question by this Court is plainly in the public interest for it involves the carrier's duty to strike bound shippers, the jurisdiction of the District Court of the United States, and the authority of the Interstate Commerce Commission under the Interstate Commerce Act. It involves a situation and a question which we all know from our common experience and observation could easily erupt, if the respective rights of the parties are not finally settled, in periodic general tie-ups of all transportation service.

The question involved is not one which occurs only intermittently, for with the growing number of disputes which managements of industry and labor unions have had in the past few years and with the same recurring annually or upon the expiration of the contract between the two, it is getting quite usual for picket lines to be established around industries' plants. Also it is commonly known that such picket lines will not normally be crossed by members of other labor unions or brotherhoods. Therefore, it is necessary in the public interest for the respective rights and duties of the carrier who would normally serve said plants, if it were not for the fact that its own unionized employees will not cross a picket line, to be finally settled, and likewise, the rights and duties of industry whose employees are out on a strike and who have established the picket line.

The question presented directly concerns the jurisdiction of the District Court of the United States and the authority of the Interstate Commerce Commission under the Interstate Commerce Act. When a railroad has established or adopted a practice or a course of conduct which it uniformly carries out in regard to strike bound shippers, then can that practice or course of conduct be challenged in any court in which any of the various shippers may find the carrier? May one of the courts find that such uniformly applied practice was reasonable and another court find the same unreasonable and assess heavy damages, while the same practice is involved in both instances?

If such a practice or course of conduct upon the part of the railroad is only a defense to a common law action for damages, as held by the court below, and then only if a jury or the trial court should think the same reasonable, then one jury could decide that such practice was unreasonable because the railroad did not place armed guards on its switching engines and thereby force an entrance into a shipper's plant; another jury might say that such a practice was unreasonable because the railroad should have officers switch the plant; and another jury could say the railroad should have disciplined its own employees upon their refusal to cross the picket line by taking them out of service. If this be the law, then the carrier could never establish a practice to guide itself by in the future in cases of strike bound shippers. In each instance the carrier must wait until after a trial and a jury determination as to whether it was liable to such a strike bound shipper for the profits the shippers might have made if their employees had not been on a strike.

For this reason this Court should settle the question, whether under the Interstate Commerce Act, prior resort should not be made in all instances to the Interstate Commerce Commission, for its decision and determination as

to whether the practice established upon the part of the railroad and uniformly applied by it to all strike bound shippers is reasonable and lawful. That such prior determination by the Interstate Commerce Commission should be secured before a lawsuit could be brought to recover damages alleged to have been sustained by a complainant because of the application of such practice by the railroad.

2. The decision of the Court below is believed to be erroneous and probably conflicts with applicable decisions of this Court. It is generally agreed that under the Interstate Commerce Act and the decision of this Court in *Tex. & Pac. Ry. Co.* vs. *Abilene Cotton Oil Co.*, 204 U. S. 426, that wherever a rate, rule or practice upon the part of a carrier is attacked as being unreasonable or as unjustly discriminatory, there must be a preliminary resort to the Interstate Commerce Commission. The motion to dismiss, filed by defendant railroad company in this case, sets up a practice upon its part in regard to strike bound shippers, such as complainant. The practice being that it would regularly send out its switching crew to the complainant's plant with instructions to switch the same even though the train each time upon arriving at the plant and ascertaining the existence of a picket line would refuse to deliver empties therein and remove the loads therefrom because of being barred from the picket line and the apparent danger there existing. It is also true that in regard to this practice upon the part of the railroad company it did not and would not send armed guards, armed employees or officers to force an entrance into such strike bound plants, and neither did the railroad company discipline its own employees by taking them out of service for their failure to cross such picket line. This undoubtedly is a practice as much as the ones involved in *Morrisdale Coal Co.* vs. *Penna RR. Co.*, 230 U. S. 304; *Loomis* vs. *Lehigh Valley RR. Co.*, 240 U. S. 43; *Northern Pacific*

Ry. Co. vs. *Solum*, 247 U. S. 477; and *St. Louis B. & M. Ry. Co.* vs. *Brownsville Navigation District*, 304 U. S. 295. When the Court below held this practice set up by the defendant railroad in this case was only a defense to a common law action and not one requiring a prior resort to the Interstate Commerce Commission, then such holding of the Court below is in conflict with the holdings of this Court in the cases just cited.

The Interstate Commerce Commission has in two recent instances dealt with the duties and obligations owing by a carrier to strike bound shippers, and in each of these instances the carriers would regularly attempt to serve such shippers during their strike, but were prevented from doing so because of the picket lines maintained by the shipper's striking employees. In neither instance did the carrier attempt to force an entrance into the shipper's plant by armed guards, armed employees or officers or by disciplining the carrier's own employees. In both instances the Interstate Commerce Commission held that this conduct upon the part of the carrier was not unlawful. *Montgomery Ward & Co.* vs. *Consolidated Freight Ways, Inc.*, 42 MCC 225; *Montgomery Ward & Co.* vs. *Chicago Ry.*, 268 ICC 257.

To allow the Trial Court in this case to entertain a suit involving this practice established by the defendant railroad company in regard to strike bound shippers and at the same time allow other courts to entertain similar suits involving the same practice, would necessarily result in different courts reaching different results. Not only would there be a difference in results reached by the different courts, but the courts would also necessarily differ from the decisions of the Interstate Commerce Commission. This then would eventually lead to confusion and discrimination which Congress, by the passage of the Interstate

Commerce Act, sought to prevent, wherein it established one body to deal with the rates, rules and practices of carriers, to-wit, the Interstate Commerce Commission.

The Interstate Commerce Commission has not passed a general regulation setting forth the obligations of carriers to serve strike bound industries. In the absence of such a regulation, then the only obligation upon the part of a railroad to a strike bound industry is to adopt a reasonable practice and thereafter uniformly apply the same to all strike bound plants. Under the prior holdings of this Court, beginning with the *Abilene* case cited above, then the only body which can determine whether such practice which the railroad establishes under such circumstances is reasonable or not is the Interstate Commerce Commission. That body's decision is required because the inquiry is essentially one of fact and of discretion in technical matters and uniformity can be secured only if final determination is left to the Commission. Whether the practice of the railroad should include the disciplining of the railroad's own employees by taking them out of service for their failure to cross the picket line should be determined by a body which has the adequate appreciation of what that might result in to the whole transportation system of this country. Likewise, whether the practice of the railroad should include sending armed guards or armed employees, or whether the officers and management of the railroad company itself should serve the strike bound plant, should be left to this body of experts on transportation matters set up by Congress to pass upon such practices of railroads.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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(3410)

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No. 592

IN THE

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VS.

ACME BRICK COMPANY,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Opinions Below

The opinion of the District Court (R. 18) is unreported. The opinion of the U. S. Court of Appeals for the Fifth Circuit (R. 23-25) is reported at 186 F. 2d 125.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Question Presented

Whether a party may breach contractual, common law, and statutory duties owed as a common carrier to the complaining shipper, and then "set up" in a "speaking" motion to dismiss a defense amounting to

a confession and avoidance, with the contention that the reasonableness vel non of such defense presents an administrative question which the judiciary is powerless to adjudicate.

Statutes Involved

The pertinent provisions of the Interstate Commerce Act, Title 49, U. S. C., and Article 6360 of the Revised Civil Statutes of the State of Texas, are set forth in the Appendix at pp. 21-22.

Statement

This is a suit for damages and statutory penalties brought by the respondent against petitioner for the latter's refusal to furnish its car service to complainant's plant located in and near the City of Bridgeport, Wise County, Texas. The respondent's version of the facts, as contained in its complaint, was that for many years this Bridgeport plant had been serviced by the carrier by means of a spur track of the carrier which connected with its main line at a switch some 1400 feet from respondent's premises. The carrier's spur track connected with a track located on the shipper's premises which was maintained by the carrier, but the cost of which was borne by the shipper. Petitioner was the only carrier available to respondent.

On October 4, 1948, the carrier commenced an embargo of shipper's premises, refusing its car service to the shipper until the 22nd day of April, 1949. The embargo thus lasted for 6½ months, despite the shipper's continued requests during said period for

car service to ship its products into intrastate and interstate commerce. One of the carrier's freight cars had been loaded at shipper's plant with its products on or before the institution of the embargo, and the carrier had issued shipper a bill of lading on this carload. Nevertheless, the carrier refused to pull said car from the shipper's premises until on or about January 16, 1949. Empty cars, which were already on said premises at the institution of the embargo, were removed therefrom by the carrier empty, not allowing them to be filled by the shipper with its products despite its protests, requests and demands.

The shipper had received numerous orders for its products prior to the institution of the embargo, and in fulfillment thereof shipper would have delivered to the carrier for shipment at least 2500 tons of its products per month but for the embargo. Because of the refusal by carrier to furnish car service, shipper was caused to suffer loss of profits and damage to its good will. Further, during the period of the embargo, shipper was put to additional handling and storage expense of its products, resulting in further damage to shipper.

The aforesaid acts of omission on the part of the carrier in refusing its car service were alleged to be in violation of the Interstate Commerce Act, Title 49, U. S. C., Sections 1 to 8 (insofar as interstate shipments were involved), and in violation of Article 6360 of the Revised Civil Statutes of Texas (to the extent that intrastate shipments were involved), as well as to be breaches of contractual and common law duties

owed by the carrier to the complaining shipper (R. 1-14).

In response to the complaint the defendant carrier filed a motion to dismiss which alleged that the trial court lacked jurisdiction of the subject matter because an administrative question was purportedly involved requiring primary resort to the Interstate Commerce Commission, in which administrative body sole and exclusive jurisdiction was said to be vested (R. 14-16). At a hearing on the motion, the case was summarily dismissed by the trial court without consideration of answer or evidence (R. 18).

Issue was thus never joined, and the *merits* of the shipper's cause of action have at no time been involved in the history of this litigation. Accordingly, the following language by this Honorable Court in its opinion in *Armour & Co. v. Alton R. Co.*, 312 U. S. 195, 197, would seem to be aptly pertinent:

> "Since the cause was dismissed without answer or evidence, it is on the basis of the allegations of the complaint that we must apply the controlling law."

Acme pleaded violations of statutory and common law duties on the part of Rock Island, and from the above quoted rule there would appear to be no question but that the trial court had jurisdiction of the cause. However, the carrier was successful in convincing the trial court that the doctrine of primary jurisdiction deprived the judiciary of any power to adjudicate the matter and vested sole and exclusive jurisdiction in the Interstate Commerce Commission.

The United States Court of Appeals for the Fifth Circuit reversed the action of the trial court and remanded the cause for an original trial on the merits, saying "that the issue presented by the motion went not to the jurisdiction of the case but to the liability of the defendant," and that the matter should have been "judicially tried out" (R. 24).

The sole question presented the United States Court of Appeals was as to the propriety of the trial court's action in summarily dismissing the cause. Since issue had never been joined and the merits of the shipper's cause of action were not involved, the opinion of the Court of Appeals in no way passes upon the question of whether or not there was a legal duty owing to the complaining shipper and, if so, whether or not said duty was violated. Its opinion amounts only to a holding that the *act* of deciding whether or not there had been a breach of a legal duty is by nature a judicial function rather than an administrative one.

Argument

The petition for writ of certiorari in the case at bar requests this Honorable Court to review a non-final judgment of an appellate court remanding a cause to the trial court for an original trial on its merits.

Should this Honorable Court choose to review that judgment on certiorari, again the only issue which could be involved would be as to whether or not the doctrine of primary jurisdiction applied so as to have deprived the trial court of jurisdiction over the subject

matter and relegated the question exclusively to the Interstate Commerce Commission.

Petitioner's brief (page 3) in its "Statement" says that "the facts are not disputed." Since there are no facts, the case having been dismissed at a summary hearing without consideration of evidence, there is nothing to dispute, and so the abstract statement is correct. The carrier's motion to dismiss alleged that there was "apparent an imminent danger" existing at picket lines of striking employees of the shipper and that because of this the carrier's crews were unable to service the plant. The motion in no way sets out any evidentiary facts as to what such violence consisted of, but merely gives the opinion of the carrier's counsel as to the ultimate fact of danger and an "inability" upon the part of the carrier to service the plant. The carrier's affidavit did not comply with the Federal Rules of Civil Procedure (Rule 56e), because it set forth ultimate facts rather than evidentiary facts and especially because the motion was composed mainly of opinions and hearsay evidence of biased parties, to wit, the carrier's counsel. *Sartor v. Arkansas Natural Gas Corp.*, 321 U. S. 620.

If under any interpretation of the facts it is to be said that they are undisputed, their only version could be that there was no violence, or threats thereof, in connection with any management-labor disputes between the shipper and its employes. As a matter of fact the shipper instituted an action in the State Court seeking an injunction restraining the shipper's employees from conducting the picketing activities in

question. This suit is No. 7733 on the Docket of the District Court of Wise County, 43rd Judicial District of Texas. By order dated 24th of January, 1949, which appears of record in Vol. T pps. 255 and 256 of the Civil Minutes of that court, Judge J. E. Carter found that the picketing activities in question "constituted no physical obstruction to ingress or egress to or from the Acme Brick Plant . . . . The court further finds that the defendant's (i.e. the Union) picketing and other activities were free of violence or threats thereof, were not carried on by more than two pickets at any one time and constituted no physical obstruction to anybody going into or coming out of the plant."

The shipper is not to be deprived of its right to trial by jury merely because the carrier's counsel are willing to swear that there was such force and violence existing at the picket line that the carrier's employees were under an "inability" to service the plant. A motion to dismiss cannot be substituted for a trial on the merits and doubtful issues cannot be resolved on such a motion. Affidavits in support of such motions can do no more than raise questions of fact; fact questions cannot be decided by affidavits at a summary hearing, especially when they consist of opinion and hearsay statements of biased parties.

I.

The Decision Below Is Clearly Correct

Under the doctrine of primary jurisdiction courts cannot determine a controversy involving an administrative question where the question *necessarily* demands the exercise of administrative discretion "requiring the special knowledge, experience, and services of the administrative tribunal to determine technical and intricate matters of fact, and a uniformity of ruling is essential to comply with the purposes of the regulatory statute administered." "The Doctrine of Primary Adminstrative Jurisdiction—Supreme Court Cases," 94 L. ed. 806.

On the other hand, "the principle has no application in relation to a question which, while properly determinable by an administrative tribunal, does not involve a question of fact but one of pure law, as determinable apart from the exercise of administrative discretion, and the requisite uniformity of determination is attainable otherwise than by confining determination of the question to the administrative tribunal." Ibid., 94 L. ed. 808.

The test is laid down by this Honorable Court in the following language from *Great Northern R. Co. v. Merchants Elevator Co.*, 259 U. S. 285, 291:

> "But, ordinarily, the determining factor is not the character of the function, but the character of the controverted question and the nature of the inquiry necessary for its solution."

What is the character of the controverted question

in the case at bar, and just what is the nature of the inquiry necessary for its solution? Even under the carrier's view of the case, is not the sole question of fact as to whether such violence existed at the times and on the occasions in question as would justify the carrier's employees in making a good faith refusal to cross the picket line, or whether, as contended by the shipper, said trainmen were merely cooperating with the strikers and thereby engaging in a secondary boycott? The "nature of this inquiry" in no way presents complicated, technical questions of fact (as was true in *Armour and Co. v. Alton R. Co.*, supra, and in the very recent case of *Alabama Great S. R. Co. v. U. S.*, 95 L ed. 190, where the hearings lasted over a period of eight years and resulted in a record of some 16,000 pages and 1500 exhibits).

Instead, the only fact question necessary for the determination of the case at bar, under a plea of confession and avoidance, is one applying the "reasonable man" test, to-wit: Under the facts and circumstances existing during the six and a half months period of the embargo would a reasonable train crewman have been put in fear of his personal safety and the safety of his equipment if he had attempted to furnish the shipper with car service? It is respectfully submitted that the specialized training of the Interstate Commerce Commission is not needed, nor would those technicians be any more qualified to pass upon this simple fact issue than would be a local jury.

Once the facts had been ascertained, the court would then be in a position to declare their legal effect and

pass upon the question of law as to whether or not there was any liability upon the part of the carrier. A failure to furnish cars is an ipso facto breach of the carrier's common law and statutory duties. The *reason* for such failure does not determine whether the *act* of passing upon the existence of such reason and its legal effect is administrative or judicial. Where the act is ipso facto illegal, it is not necessary that preliminary resort be had to the Commission for a declaration to that effect by it. In an action involving an ipso facto illegal rebate, this Honorable Court said:

> "Being an act prohibited by law, it was not necessary to have any preliminary decision to that effect by the Commission, but the courts could, as in any other case, apply the law to the facts proven and award damages to the person injured." *Mitchell Coal & Coke Co. v. Penn. R. Co.*, 230 U. S. 247, 266.

This is not a case where some act of the carrier is attacked and declared to be in violation of the Act because it is unreasonable or discriminatory. If it were, a question of *degree* would be involved—and the act of comission or omission of the carrier would be invalid only if it had passed over the dividing line into the zone of "unreasonableness" or "discrimination."

Where, however, the act complained of is in an of itself a violation of duty (as in the case at bar the refusal of car service constitutes an ipso facto breach of duty), there remains no question for the Commis-

sion to pass upon. Even if the matter were submitted to the Commission, it could not sanction such a violation by its order. *Penn. R. Co. v. International Coal Mining Co.*, 230 U. S. 184. There this Honorable Court said, of an act of a carrier in giving a refund:

> "It could not have been legalized by any proof, nor could the Commission by any order have made it valid. The rebate being unlawful, it was a matter where the court, without administrative ruling or reparation order, could apply the fixed law to the established fact that the carrier had charged all shippers the published or tariff rate, and refunded a part to a particular class." Id, p. 197.

If the Commission cannot excuse the carrier from a clear violation of duty, would it not be futile to require a litigant to resort to the Commission when he has already exercised his option under Section 9 of the Act to pursue his claim in a court of law? The Commission could do no more than award the damages the court would award.

Petitioner would infer to this Honorable Court that it had a custom of long standing to embargo shippers having domestic labor-management problems, but even reliance on such a custom could not excuse its breach of duties. A carrier cannot make rules or regulations violative of its duties, nor can it make private covenants, even with states, violative of the Interstate Commerce Act. *L. & N. v. Cook Brewing Co.* 172 Fed. 117, 119; *aff'd* 223 U. S. 70.

Likewise, a custom, rule, regulation, "practice" or whatnot of a carrier to refuse service to a shipper

on the ground that the latter's employees have a picket line in existence is illegal under the Texas statute, Art. 6360. *Turner v. Zanes*, 206 SW (2) 144, 150, par. 2 (Tex. Civ. App., error refused, N.R.E.). Among the authorities cited by the Texas court in the Zanes case is *Burlington Transp. Co. v. Hathaway*, 234 Iowa 135, 12 NW (2) 167, 149 A.L.R. 1238.

This Iowa case is cited as authority for the following statement in the pocket part of 9 Am. Jur., "Carriers," Sec. 305:

> "And it has been held that a carrier's duty to transport goods tendered to it for shipment is not excused by showing that its employees refused to obey their employer's orders, as where they refuse to go through a picket line established by a labor union at the shipper's place of business."

II.

There Is No Conflict of Decision

Petitioner contends that the decision in the case at bar by the Court of Appeals "probably conflicts" with the decision by this Honorable Court in *Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, as well as with several other enumerated cases. That case involved a question of rates; the shipper sought a refund from what it charged was an unreasonable rate, the rate being filed by the carrier in its tariff. This court was there of the opinion that the question should be determined by the Commission in order that there might be attained a uniformity of rates over the country.

> "For if, without previous action by the Commission, power might be exerted by the courts and juries generally to determine the reasonableness of an established rate, it would follow that, unless all courts reached an identical conclusion, a uniform standard of rates in the future would be impossible . . ." Id., p. 440.

Loomis v. Lehigh Valley R. Co., 240 U. S. 43, involved the reasonableness of a rate, as did *No. Pac. Ry. Co. v. Solum*, 247 U. S. 477, where it was said that any "practice involving a rate" should be passed upon first by the Commission as to whether or not it was unreasonable or discriminatory.

In *Morrisdale Coal Co. v. Penn. R. Co.*, 230 U. S. 304, the carrier's car distribution rule in time of car shortage was attacked by the shipper on the ground

it was discriminatory and unreasonable. There was no complaint that the shipper wasn't getting any cars, but that the number of cars it received under the carrier's rule was arrived at by an unfair calculation.

If any effect is to be given to Sections 8, 9 and 22 of the Interstate Commerce Act, it must be recognized that in those instances of an ipso facto violation of the act the courts have the power to hear the matter and award damages. This Honorable Court has on many occasions recognized that there is a limitation to the primary jurisdiction rule and "that, for doing an act prohibited by the statute, the injured party might sue the carrier without previous action by the Commission, because the Courts could apply the law prohibiting a departure from the tariff to the facts of the case." *Mitchell Coal & Coke Co., v. Penn. Ry. Co.*, 230 U. S. 247, 257.

The right to resort to the courts to recover damages for breach of the Act was expressly recognized in the case of *Chicago, R. I. & P. Ry. Co. v. Hardwick Farmers Elev. Co.*, 226 U. S. 426:

> "Not only is there then a specific duty imposed to furnish cars for interstate traffic upon reasonable request therefor, but other applicable sections of the Act to regulate commerce give remedies for the violation of that duty. . . . Further, by Section 9 an election is given to either make complaint to the Interstate Commerce Commission *or* to bring, in a designated *court*, an action for the recovery of damages." Id., p. 434-35. (Emphasis added)

It has likewise been recognized on many occasions by this Honorable Court that the state courts have jurisdiction concurrent with the federal courts of a suit by a shipper against an interstate carrier to recover damages arising in interstate commerce of the latter's failure to discharge its duty, existing under the *common law* or *local statute*, to furnish the cars needed and requisitioned by the shipper. 9 Am. Jur. 649, citing the following U. S. Supreme Court Cases:

Penn. R. Co. v. Stineman Coal Mining Co., 242 U. S. 298;
Penn. R. Co. v. Sonman Shaft Coal Co., 242 U. S. 120;
Ill. Central R. Co. v. Mulberry Hill Coal Co., 238 U. S. 275;
Penn. R. Co. v. Puritan Coal Mining Co., 237 U. S. 121;
Eastern R. Co. of N. M. v. Littlefield, 237 U. S. 140.

If the State Courts have jurisdiction of such suits for refusal to furnish car service it necessarily follows that the Federal Court has jurisdiction of the same question where there is a diversity of citizenship between the parties and a sufficient jurisdictional amount is involved.

In petitioner's motion to dismiss there was no pleading of the existence of any prior custom of embargoing shippers whose employees were out on strike, nor was there any pleading that the carrier had any

type of rule or regulation providing for such an embargo, and especially no pleading that any such rule, regulation or practice was on file in its tariff. Petitioner's assertion in its motion was just that by the very act of refusing car service to respondent it then and there established the type of "practice" as came within the primary jurisdiction rule.

This Honorable Court early recognized the necessity of limiting the connotation to be given the word "practice" as used in the Act. *U. S. v. Penn. R. Co.*, 242 U. S. 208. In 1910, by an amendment to the Act, the Commission was given power to enter orders regarding not only rates, but also regulations and *practices*. The Commission shortly thereafter issued an order requiring a carrier to furnish a certain type of tank car, with the carrier contending the Commission lacked power to make the order.

As noted in the opinion, 242 U. S. 229, the Commission, in seeking to uphold the order, contended that the "*neglect to provide* or certainly the *refusal to furnish* tank cars is a 'practice,' and became especially so by the reply made by the railroad to the request to furnish them." (Emphasis added.) As to whether the neglect to provide cars was a "practice" within the meaning of the Interstate Commerce Act, this court there said:

> "The far reaching effect of an affirmative answer is instantly apparent, and there must be hesitation to declare it from the use of so inapt a word as 'practice.' Following a well known rule of construction, we must rather suppose its as-

> sociation was intended to confine it to acts or conduct having the same purpose as its associates." Id., p. 229.

The opinion goes on to point out that to give the broad connotation to the word "practice" sought by the Commission would result in including therein any and every act the railroad committed:

> ". . . if the argument based upon the word 'practice' or 'practices' were sound, it could be contended with equal reason that every detail of railroad operation is a practice within the meaning of the act; . . ." Id., p. 233.

The fallacy in petitioner's argument is just as obvious for it, too, applies with equal reason to any act a carrier might commit or omit. Under petitioner's reasoning, whenever a shipper sued for damages resulting from the carrier's violation of duty the carrier could plead any manner of frivolous defenses and claim that the question of whether or not they were reasonable was an administrative question for the sole determination of the Commission.

III.

There Is No Important Question of Federal Law

The holding of the Court of Appeals below has no national significance despite any erroneous interpretation sought to be imputed to it. There has been no holding that the carrier was under an "absolute duty" to furnish car service, as inferred in petitioner's Second Specification of Error.

If this point of error is being urged in good faith, it is obvious that petitioner is incorrect in its interpretations as it was incorrect in the first place in saying that the opinion is unreported, (petition, p. 1). As previously pointed out, this case was dismissed without answer or evidence, and the merits have at no time entered into issue.

The court below only held that there was jurisdiction in the judiciary to adjudicate questions of law and to make findings of ordinary facts the determination of which do not necessarily involve administrative questions. The holding therefore makes no change in the existing law on the subject, for its only effect is a recognition of the long-standing right to proceed in a court of law against a carrier who breaches its contractual, common law and statutory duties.

If there is any point in the case of national importance, it is the right of a shipper, under Section 9 and 22 of the Interstate Commerce Act and under Article 6360 of the Revised Civil Statutes of Texas,

to resort to the courts for the recovery of damages suffered when a carrier breaches its common law and statutory duties and thereby causes the shipper's contracts to be canceled for non-fulfillment and its good will to be damaged.

This right of the shipper to so resort to the courts has been long recognized by this Honorable Court, and consequently no question of first impression is herein presented. If the case at bar were reviewed by this Honorable Court, it is believed that it would once again recognize this time-honored right and arrive at the same just result reached by the Court of Appeals below. Consequently nothing would be gained by this Court's again passing upon the matter.

CONCLUSION

The decision below was clearly correct. It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

1. Interstate Commerce Act, Title 49 U. S. C.

"Sec. 8:

"Liability in damages to persons injured by violation of law. In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the Court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

"Section. 9:

"Remedies of persons damaged; election; witnesses. Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which

one of the two methods of procedure herein provided for he or they will adopt. . . ."

"Sec. 22:

". . . and nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies; . . ."

2. Article 6360, Revised Civil Statutes of Texas:

"*Refusal to transport*

"In case of the refusal by such corporation (i.e., railroad corp.) or their agents so to take and transport any passengers or property, or to deliver the same, or either of them, at the regularly appointed time, such corporation shall pay to the party aggrieved all damages which shall be sustained thereby, with costs of suit; and in case of the transportation of property shall in addition pay to such party special damages at the rate of five per cent per month upon the value of the same at the time of shipment, for the negligent detention thereof beyond the time reasonably necessary for its transportation. In suits against such corporation under this law, the burden of proof shall be on such corporation to show that the delay was not negligent." (Acts 1887, p. 116; G. L. vol. 9, p. 914).